Nos. 110-112

In the Supreme Court of the United States

October Term, 1939

Guy T. Helvering, Commissioner of Internal Revenue, petitioner

v.

Mary Q. Hallock and Central United National Bank of Cleveland, trustees

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Guy T. Helvering, Commissioner of Internal Revenue, petitioner

v.

Mary Q. Hallock, Executrix, Estate of Henry Hallock, deceased

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Guy T. Helvering, Commissioner of Internal Revenue, petitioner

v.

S. H. Squire, Superintendent of Banks of the State of Ohio, Etc.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEES

No. 111

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v.

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S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 38–42) is reported in 34 B. T. A. 575. The opinion of the Circuit Court of Appeals (R. 70–75) is reported in 102 F. (2d) 1.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 13, 1939. (R. 69.) The petition for writs of certiorari was filed June 13, 1939, and granted October 9, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter vivos* trust which provided for the payment of the income therefrom to the extent of $6,000 a year to his then wife, Anne Lamson Hallock, from whom he was shortly thereafter divorced. Upon the death of Anne Lamson Hallock, or earlier termination of the trust, the principal of the trust was to be delivered to the decedent if he should then be living, or in the event he should not then be living, to the decedent's son and daughter, with provision for other disposition in the event that either son or daughter should not then be living.

The question is whether the value of the remainder interest in the trust should be included in the decedent's gross estate under Section 302 (c)

of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved are set forth in the Appendix, *infra*, pp. 35–43.

STATEMENT

The facts as stipulated (R. 28–38) and as found by the Board of Tax Appeals (R. 38–42) are in substance as follows:

Henry Hallock died October 10, 1932, testate. His widow, Mary Q. Hallock, was duly appointed executrix of his estate. (R. 38.)

On September 3, 1919, Henry Hallock, a resident of Cleveland, Ohio, entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500 a month as alimony and for the creation of a trust to produce this sum. On the same day Henry Hallock created a trust of 884 shares of 7 percent preferred stock of the Ohio Rubber Company, the First Trust & Savings Company of Cleveland, Ohio, an Ohio corporation, being made trustee. The dividends of such stock amounted to $6,188 per annum, which would be sufficient to meet the payment of $6,000 per year to the wife and leave $188 per year for the expenses and compensation of the trustee. (R. 29, 39.) Any sums of income in excess of $6,000 a year, plus certain expenses, were to be paid to the

decedent, his heirs, executors, administrators or assigns. (R. 30.) The decedent reserved for himself, his heirs, executors, administrators and assigns the right to substitute in place of any securities which might at any time be part of the trust fund new and different securities which in the opinion of the trustee were of equal value to the securities sought to be replaced. (R. 31–32.)

The Union Trust Company was the successor in trust of the First Trust & Savings Company, and it is now in liquidation by S. H. Squire, Superintendent of Banks of the State of Ohio. (R. 39.)

The trust agreement contained the following provisions with reference to the disposition of the trust estate (R. 32):

> C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part [grantor] if he then be living any accrued income then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would

have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

D. Party of the First Part reserves to himself, his heirs, executors, administrators, and assigns the right at his option if and in the event said Anne Lamson Hallock shall marry any other person than said Henry Hallock to pay to said Trustee on or within six months after said marriage the sum of Twenty Thousand Dollars ($20,000.00) and deliver over to said Trustee evidence that said Anne Lamson Hallock has so remarried. Upon receipt of said fund and said proof by Trustee, if and in the event said proof is satisfactory to Trustee, then and in such event Trustee shall deliver the said fund of Twenty Thousand Dollars ($20,000.00) to said Anne Lamson Hallock. This trust shall terminate and the disposition of the then accrued income and trust fund shall be made pursuant to Paragraph C above.

This trust may be terminated, modified, altered, canceled or in any way varied by the written consent of the Party of the First Part and beneficiary.

Anne Lamson Hallock secured her divorce in 1919. The trust was in effect at the time of the decedent's death in 1932 and Anne Lamson Hallock was still living and had not remarried. (R. 39.)

The executrix of the estate filed an estate tax return showing no tax due. (R. 38.) In the audit

of the return the Commissioner contended that the value of the 884 shares of 7 per cent preferred stock of the Ohio Rubber Company, constituting the corpus of the trust, should be included in the gross estate, and increased the gross estate by $70,720. (R. 38.) On the basis of the valuation of $70,720 for the shares and the age of Anne Lamson Hallock at the time of decedent's death, the fair value of the life estate or interest of Anne Lamson Hallock in the trust estate at the date of the decedent's death was $25,743. (R. 37.)[1]

Before the Board the executrix and transferees contended that no part of the value of the corpus of the trust should be included in the gross estate, or, in the alternative, that the value f Anne Lamson Hallock's life interest as of the date of decedent's death should be excluded. (R. 40.) The Board held that no part of the value of the trust was to be included, and determined that there was no deficiency. (R. 40–42.)

Upon appeal the Government contended that the value of the corpus less the value of Anne Lamson

[1] The Commissioner also made other adjustments, as to which no question is being raised in this Court, and asserted a deficiency of $6,096.97 against the estate of Henry Hallock. A deficiency in like amount was also asserted against Mary Q. Hallock and Central United National Bank of Cleveland, Trustees, as transferees, and another deficiency against S. H. Squire, Superintendent of Banks of the State of Ohio, in charge of liquidation of the Union Trust Company, Successor of the First Trust and Savings Company, Trustee, as transferee. (R. 38.)

Hallock's life estate should be included in the gross estate under Section 302 (c). The court below held that the case was controlled by the decisions of this Court in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, and that no part of the value of the corpus should be included.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the remainder interest in the trust should not be included in the gross estate under Section 302 (c) of the Revenue Act of 1926.

2. In determining that there is no deficiency in estate tax.

SUMMARY OF ARGUMENT

I

In 1919 the decedent created a trust to remain in effect so long as his wife should live. It provided that the income therefrom should be paid to the wife and the corpus should be returned to him at her death, with provision for the payment of the corpus to his son and daughter if he did not survive the life tenant.

The value of the remainder interest in the trust estate should be included in the decedent's gross estate as a transfer in trust intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act

of 1926, as amended (Appendix, *infra*, p. 35). This is not a case where the decedent made a grant of a vested remainder interest to others, retaining a "mere possibility of a reverter," so that the decisions of this Court in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, do not control. In this case the death of the decedent was the indispensable and intended event which effected a transmission of the remainder interest from the decedent to his son and daughter. The case is controlled by *Klein* v. *United States*, 283 U. S. 231. Here, as there, the decedent retained a vested interest in the transferred property, and until his death the interests of his son and daughter were contingent as to title, possession and enjoyment. His death was essential to the vesting of the remainder in his son and daughter, and that fact furnishes the justification for the imposition of the tax.

II

In any event, *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.* have adopted a purely formal and unreal test for determining the taxability of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. Those cases are inconsistent with a long line of earlier decisions of the Court and particularly with *Klein* v. *United States*, *supra*. They are contrary to the clear intention of Congress and deprive the statutory provision of virtually any substance. They should be overruled.

ARGUMENT

Introductory—In the cases at bar the decedent in 1919 created a trust for the payment of alimony, the payments to serve as satisfaction of any claim of the grantor's wife for support, dower, or inheritance. Upon the death of the grantor's wife the trust was to terminate and the principal of the trust fund was to be delivered to the grantor. The instrument provided for other disposition in the event that the grantor should not be living at the death of his wife. In that event, the principal was to go to the children or grandchildren of the grantor, the provision reading as follows (R. 32, par. C):

> If and in the event said Party of the First Part [decedent] shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

At the decedent's death in October 1932, his divorced wife was still living, and the trust continued in force. The question presented is whether the

value of the trust property, less the value of the life estate, may be included in the decedent's gross estate as a transfer "intended to take effect in possession or enjoyment" at or after the decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926, *infra*.

It is the Government's position that, so far as the remainder is concerned, the conveyance to the beneficiaries was a substitute for testamentary disposition, that it was a transfer intended to, and one which did, take effect in possession or enjoyment at or after the grantor's death, and that hence the remainder must be included within the grantor's gross estate by virtue of the express terms of the taxing Act.

Three recent decisions of this Court bear upon the question here involved: *Klein* v. *United States*, 283 U. S. 231; *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39; and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48. A holding that the present cases are ruled by the *Klein* case would require a decision for the Government; a contrary result would follow if the *St. Louis Trust Co.* cases are applied and deemed to be controlling.

We believe that the instant cases fall within the rule of the *Klein* case rather than within the rule of the *St. Louis Trust Co.* cases, and we will undertake to support that position in Point I. However, we believe that the distinction between the *Klein* and the *St. Louis Trust Co.* cases

is so narrowly technical and unsound that we will urge, in the alternative, in Point II that the latter cases should be expressly overruled.

I

THE REMAINDER INTEREST IN THE TRUST PROPERTY WAS TO PASS FROM THE SETTLOR AND VEST IN OTHERS ONLY UPON THE CONDITION PRECEDENT THAT HE DIE DURING THE CONTINUANCE OF THE TRUST. ACCORDINGLY THE TRANSFER OF THAT REMAINDER INTEREST WAS INTENDED TO TAKE EFFECT AT OR AFTER THE SETTLOR'S DEATH AND FALLS WITHIN THE RULE OF THE *KLEIN* CASE

In the *Klein* case the grantor conveyed to his wife a life estate in certain lands, but provided that in the event she survived the grantor she was to take the lands in fee simple. The husband died before the wife. The Commissioner ruled that the transfer of the remainder was one intended to take effect in possession or enjoyment at or after the grantor's death. This Court sustained the Commissioner's determination, saying (283 U. S. at 233–234):

> The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore, was contingent. * * * It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger

estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

Helvering v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co., supra,* decided by a bare majority of the Court, did not overrule the *Klein* case, but sought to distinguish it. In the first of these two cases the decedent transferred securities in trust, the income to be paid to his daughter during her life, with remainder over to named beneficiaries. The indenture contained a further provision that if the daughter should predecease the grantor the estate was to be paid over to the grantor. This Court, construing the trust instrument, concluded that the grantor retained nothing save a "mere possibility of a reverter," and had no power to resume ownership, possession, or enjoyment "except upon a contingency in the nature of a condition subsequent" (296 U. S. at 43). The *Klein* case was distinguished on the ground that there the remainder became vested in the grantee only "upon the condition precedent that the grantor die during the life of the grantee" (*idem,* p. 45). In the *Becker* case, the trust instrument provided that the grantor's child should receive a stated income, and that if the child should die before the grantor the estate should "thereupon revert" to the grantor, or if the grantor should die

before the child, then the property should become the child's immediately and absolutely. This Court, emphasizing the provision that the trust estate should "revert" in case of the predecease of the beneficiary, stated that the question was whether the "mere possibility of a reverter" brings the transfer within the reach of the statute (296 U. S. at 50–51). In this view, it was held that the case was ruled by the decision in *Helvering* v. *St. Louis Trust Co.*, decided the same day.

If the distinction upon which the *St. Louis Trust Co.* cases appeared to turn—i. e., between (1) a vested remainder subject to defeasance by a condition *subsequent*, on the one hand, and (2) a contingent remainder subject to a condition *precedent*, on the other—be followed, then we believe that the interests transferred and retained in the present cases are within the latter category and hence within the statute. The grantor's children had only a contingent remainder subject to the condition precedent that he predecease the life tenant, while the grantor retained a vested interest subject to being divested only by his predeceasing the life tenant. He retained far more than a "mere possibility of reverter", and this case is therefore ruled by the *Klein* case rather than by the *St. Louis Trust Co.* cases.

In the leading case of *Doe, Lessee of Poor,* v. *Considine,* 6 Wall. 458, this Court quoted and adopted the following familiar test for distinguish-

ing between vested and contingent remainders (p. 476):

> Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time*, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainder-man before the determination of the particular estate, his vested estate will be subject to be devested by that event, and the interest of the substituted remainderman which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder.

Under this test it would seem clear that the decedent retained a vested interest in the transferred property which was divested only by his death. The "particular estate" was for the life of his divorced wife. That estate was to "determine" by her death, or remarriage, the first of which events "must unavoidably happen by the efflux of time." Immediately upon the determination of the particular estate possession of the property was in all events to be returned to the decedent,

with the one exception—his own death prior to the determination of the particular estate. Thus, in every respect the test is met. See also *McArthur* v. *Scott*, 113 U. S. 340, 380; *Simpson* v. *Welsh*, 44 Ohio App. 115, 119; *Boye* v. *Boye*, 300 Ill. 508, 511.

The distinction between vested and contingent remainders is similarly spelled out as follows in the well-known definition in Gray, *Rule Against Perpetuities* (3d Ed), § 9:

> A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine. A remainder is contingent if, in order for it to become a present estate, the fulfilment of some condition precedent, other than the determination of the preceding freehold estates, is necessary * * *

Thus, the interest retained by the grantor herein was vested because it was ready to become a present estate upon the termination of the life estate in his wife. Certainly, it was far more substantial than a "mere possibility of reverter".[2] The re-

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[2] We are somewhat at a loss to know precisely what the Court meant when it said that the grantors in the *St. Louis Union Trust Co.* cases had a "mere possibility of reverter". The Court could not have been using that term in its commonly accepted meaning, namely that which remains after a determinable fee, an interest that is neither alienable nor subject to the rule against perpetuities. See Gray, *Rule Against Perpetuities* (3d Ed.) §§ 13, 41; 1 Fearne, *Remainders* (4th Am. Ed.), p. 381, n; *First Universalist Society* v. *Boland*, 155 Mass. 171. Indeed, it has even been suggested

mainder to his children, however, was contingent, because, in order for it to become a present estate, it was necessary that the grantor die during the continuance of the life estate and thus satisfy the condition precedent. See also 1 Fearne, *Remainders* (4th Am. Ed.), p. 217; 2 Washburn, *Real Property* (6th Ed.), § 1532; Challis, *Real Property* (3d Ed.), p. 74; 1 Minor, *Real Property,* §§ 739–740; *Robinson for an Opinion,* 45 R. I. 137; *Sager* v. *Galloway,* 113 Pa. St. 500; *Copenhaver* v. *Pendleton,* 155 Va. 463; Restatement, *Future Interests* (parts 1 and 2), pp. 561–564; Restatement, *Trusts,* § 129, Comment b. It is hence apparent that here, as in the *Klein* case, *supra,* the grantor retained an interest in the property which would, as to the remainder, vest in enjoyment and possession in the named beneficiaries only by virtue of the death of the grantor.

Applying these principles, it has been held in at least several comparable situations that similar transfers were intended to take effect in possession or enjoyment at or after death. *Commissioner* v.

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that after the Statute *Quia Emptores* in 1290, abolishing tenure after a fee, determinable fees and possibilities of reverter could no longer be created. Gray, *op. cit. supra,* § 31. But see Powell, *Determinable Fees,* 23 Col. L. Rev. 207 (1923); Vance, *Rights of Reverter and the Statute Quia Emptores,* 36 Yale L. J. 593. And in any event, it is doubtful that determinable fees and possibilities of reverter could ever be created in personal property.

Schwarz, 74 F. (2d) 712 (C. C. A. 2d); *Sargent* v. *White,* 50 F. (2d) 410 (C. C. A. 1st); *Union Trust Co.* v. *United States,* 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547; *Estate of Waldo C. Bryant* v. *Commissioner,* 36 B. T. A. 669, affirmed, 104 F. (2d) 1011 (C. C. A. 2d), certiorari granted, Nov. 6, 1939, No. 339, present Term; see *Hoblitzelle* v. *United States,* 3 F. Supp. 331, 334 (C. Cls.).

The application of these principles to the cases at bar is particularly called for, since the trust served to discharge the grantor's duty of support during the lifetime of his wife or, so long as she did not remarry. Thus even in respect of the life estate the property remained in a substantial sense the grantor's, being applied to the performance of an obligation owed by him. Compare *Douglas* v. *Willcuts,* 296 U. S. 1. When the transfer had served that purpose, the corpus was to be returned to him. It was only in the event that he should not then be living, and consequently have no further opportunity to make disposition of the remainder as part of his estate, that the remainder was to be conveyed to his children or grandchildren.

We submit, therefore, that the present cases are ruled by the *Klein* case, and not by *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.*

II

HELVERING v. *ST. LOUIS TRUST CO.* AND *BECKER* v. *ST. LOUIS TRUST CO.* ARE UNSOUND AND SHOULD BE OVERRULED

1. In Point I we contended that the grantor retained a *vested* interest subject to being divested only by his death prior to the termination of the life estate, that he gave his children only a *contingent* remainder, and that the transfer of the remainder was therefore intended to take effect in possession or enjoyment at or after his death within the rule of the *Klein* case.

However, if we should be wrong in thus describing the interests retained by the grantor and those transferred by him, and if they fall within the rule of the *St. Louis Trust Co.* cases, we will then contend that those cases themselves constitute a departure from the sound rule of the *Klein* case, and that they should be reexamined here.

As we understand the difference between the *Klein* and the *St. Louis Trust Co.* cases, it is simply that between a vested remainder subject to being divested and a contingent remainder—a difference primarily in terminology that has no substantial practical consequences in terms either of the quality or of the economic magnitude of the interests created. The lack of any substantiality in that difference may be illustrated by the two following examples:

(1) To A for life, remainder to the grantor, but if the grantor predecease A, then remainder to A, or to others. (*Klein* case.)

(2) To A for life, remainder to A (or to others), but if the grantor outlive A, then remainder to the grantor. (*St. Louis Trust Co.* cases.)

Thus the grantor's interest in (1) is vested subject to being divested, whereas in (2) it is contingent. But that difference is merely one of conveyancing terminology. It is not a difference that has any practical consequences. In both (1) and (2) the economic interests which the grantor retained are identical. Yet taxability has been made to depend upon whether the interest retained by the grantor is couched in terms of a vested remainder subject to being divested, as was the situation in the *Klein* case, or whether the interest retained is couched in terms of a contingent remainder, as was the situation in the *St. Louis Trust Co.* cases.

The draftsman in the *Klein* case could just as easily have phrased the transfer "to my wife in fee, but if she dies before I do, then to me." Under the rule of the *St. Louis Trust Co.* cases, that transfer would not be taxable, although it creates interests that are identical in quality with those actually present in the *Klein* case. It seems impossible to believe that Congress could have intended tax consequences to turn upon the ingenuity of the conveyancer who is free to draft the instrument either way without in the least affecting the

quality of the estates that are being created. And the Court in the *Klein* case itself recognized that taxability should depend upon the reality of the situation rather than upon niceties of the art of conveyancing or the law of contingent and vested remainders. In clear and unambiguous language this Court declared (283 U. S. at 234):

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States*, 281 U. S. 497.

We respectfully submit that the *St. Louis Trust Co.* decisions constitute a departure from the rule as announced and applied in the *Klein* case, and we urge that they be reconsidered.

In his dissenting opinion in *Helvering* v. *St. Louis Trust Co.*, concurred in by the Chief Justice, Mr. Justice Brandeis and Mr. Justice Cardozo, Mr. Justice Stone stated (296 U. S. at 47):

> Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in sus-

> pense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form. * * * However we label the device it is but a means by which the gift is rendered incomplete until the donor's death. * * *

We believe that the dissent in that case represents the correct view and is supported in principle by a considerable body of authority.[3]

[3] The question presented by the *St. Louis Trust Co.* cases was also presented to the Court in *Helvering* v. *Duke*, 290 U. S. 591, where the Chief Justice took no part in the consideration or decision of the case, and where the decree of the lower court was affirmed by an equally divided Court, (Cf. *Hertz* v. *Woodman*, 218 U. S. 205, 213–214.) The composition of the Court remained unchanged in the *St. Louis Trust Co.* cases in which the Chief Justice participated and joined in the dissenting opinion.

While the question was also present in modified form in *McCormick* v. *Burnet*, 283 U. S. 784, we believe that the Court did not pass upon it in that case. The *McCormick* case was argued together with *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, and *Morsman* v. *Burnet*, 283 U. S. 783. All three involved the common question whether the reservation of a life interest by a settlor subjected the transfer to tax. There was a conflict of decisions upon *that point* among the Circuit Courts of Appeals which was presumably the basis for the granting of the writs of certiorari. All three cases were decided together three days after argument in identical *per curiam* opinions upon the sole authority of *May* v. *Heiner*, 281 U. S. 238. *May* v. *Heiner* was relevant to the question of the effect of the reservation of a life estate by the grantor, but it had no relation to the other question that was incidentally present in the *McCormick* case with regard to the grantor's right to regain the prop-

This Court has repeatedly stated that it is the substantial effect of transactions that is important for the purpose of taxation rather than the form in which they are cast. *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Burnet* v. *Harmel,* 287 U. S. 103, 111; *Palmer* v. *Bender,* 287 U. S. 551, 555; *Burnet* v. *Guggenheim,* 288 U. S. 280, 283–284; *Reinecke* v. *Smith,* 289 U. S. 172, 177; *Estate of Sanford* v. *Commissioner,* decided November 6, 1939, No. 34, present Term. And the Court has been particularly alert to apply these principles in the field of death taxes, where it has frequently held taxable a shifting of economic benefits at death regardless of technical property law concepts. *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 335; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Tyler* v. *United States,* 281 U. S. 497, 503; *Klein* v. *United States, supra; Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160; *Gwinn* v. *Commissioner,* 287 U. S. 224, 229; *Porter* v. *Commissioner,* 288 U. S. 436;

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erty upon surviving her children. That the *McCormick* decision cannot be regarded as having ruled upon this issue is further made plain by the fact that the *Klein* case was argued on the same day as the *McCormick, Northern Trust,* and *Morsman* cases, and was decided only a few weeks later. The *Klein* opinion does not mention the *McCormick* case, and we submit that if the Court had considered the *Klein* case as distinguishable from the *McCormick* case only on so fine a point as the form of the limitation, it would have so stated. And the fact that the Court in the *Klein* case did affirmatively state that niceties in the art of conveyancing are unimportant seems conclusive that it had not decided the *McCormick* case on that ground.

Third National Bank & Trust Co. v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618; *Foster* v. *Commissioner*, 303 U. S. 618; *United States* v. *Jacobs*, 306 U. S. 363, 371; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271.

Helvering v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, constitute a clear departure from these well settled principles. Those two cases, turning as they do upon the thin distinction between a vested remainder subject to defeasance by a condition subsequent, and a contingent remainder subject to a condition precedent, have lost sight of the controlling question under the taxing statute, which is whether the transfer is intended to take effect "in possession or enjoyment" at or after the grantor's death. Substance has been sacrificed to form, and the operation of the taxing Act has been removed to a field of ambiguities and inconsistencies. It has been said that "Perhaps no question can arise in the course of legal inquiries more doubtful in its nature or less referable to fixed and certain rules and principles, than whether the words of a devise or bequest constitute a vested or contingent remainder." *Shattuck* v. *Stedman*, 2 Pick. 468, 469 (Mass.). And Chancellor Kent, referring to Blackstone's treatment of the distinction between vested and contingent remainders, praised it for its "perspicuity, simplicity, comprehension, compactness, exactness, accuracy and admirable

precision," and added "I have read the chapter frequently, but never without a mixture of delight and despair." See *Shufeldt* v. *Shufeldt,* 130 Wash. 253, 257-258.

The distinction between a contingent remainder and a vested remainder subject to being divested (sometimes referred to as an executory limitation, or conditional limitation, or shifting use) arose centuries ago out of the necessities of the medieval concepts of continuity of seisin and feudal tenure. As a consequence of the metaphysical notion that a "gap in the seisin" was impossible, contingent remainders were destructible, whereas vested remainders were not subject to this infirmity. Cf. *Archer's Case,* 1 Coke [redacted], 66 b. "The English rule as to the 'destructibility of contingent remainders' originated in the fact that, in the sixteenth century, the then already obsolescent doctrines of seisin persisted as to remainders, although they failed to gain recognition as to executory interests. Its basis was historical and not rational * * *" (Restatement, *Future Interests,* Sec. 240, Comment b). But even this distinction never existed in equity (Gray, *Rule Against Perpetuities* (3d Ed.), Sec. 324) and has long since ceased to have any practical consequences at law.

We respectfully submit that when Congress spoke of transfers "intended to take effect in possession or enjoyment" at or after death, it was simply undertaking to tax transfers that were

substitutes for testamentary dispositions, and that it never intended to revivify medieval concepts of property law as a basis for determining taxability. The decisions in the *St. Louis Trust Co.* cases to the contrary stand out in striking contrast to the realistic approach in such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *Porter* v. *Commissioner*, 288 U. S. 436, and the *Klein* case, where the shifting of economic benefits at death was held to be sufficient ground upon which to base the tax.

2. In *Helvering* v. *St. Louis Trust Co., supra,* this Court quoted (pp. 44–45) at some length from and apparently relied upon *Matter of Barstow,* 230 App. Div. (N. Y.) 371, 372–373, affirmed, 256 N. Y. 647. Courts of other states have, however, disagreed with the result reached by the New York court. In *In re Lowengart's Estate,* 160 Ore. 118, the decedent had created a trust with directions to pay the income therefrom to his daughter during her life. The instrument provided that in the event the daughter should die before the settlor the trust should terminate and the trustee should pay over the principal and any accumulation to the settlor. It was then provided that in the event the daughter should survive the settlor the trust should continue for a stated period and upon its termination the principal should be distributed to his grandchildren as therein provided. The court there held that the grandchildren of the decedent acquired a

vested remainder subject only to be defeated by the death of their mother before that of the decedent, but further held (p. 134):

> But, despite the technical vesting of the remainder interest, in a practical sense that interest was subject to an economic burden as long as the donor remained alive. "Taxes are very real things and statutes imposing them are measured by practical results." * * * The terms of the trust instrument were such that the grandchildren could never come into possession and enjoyment of the corpus of the estate until after the death of Ignatz Lowengart [the settlor]. His death made final, certain and absolute, at least so far as the provision for reverter is concerned, what had theretofore been affected by more or less doubt and uncertainty. It removed an obstacle, placed in the trust instruments by the settlor, to the beneficiaries' ultimate enjoyment of their grandfather's bounty, and as a result an economic benefit shifted to them. These things being so, we think the succession was not complete until that event occurred, and that, necessarily, therefore, the gift was intended to take effect in possession and enjoyment after the death of the donor.

Of like import are *Hackett* v. *Bankers Trust Co.*, 122 Conn. 107; *Boston Safe Deposit & Trust Co.* v. *Com'r Corp. & Tax*, 267 Mass. 240. See also *DuBois' Appeal*, 121 Pa. 368; *Wright's Appeal*, 38 Pa. 507.

In the *Lowengart* and *Bankers Trust Co.* cases, *supra,* the taxpayers relied upon this Court's decisions in *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.* The courts attempted to distinguish the cases on the ground that the federal tax is on the transfer while the state tax was on the succession. It is true that there is, as suggested by the courts, a difference in the incidence of a transfer tax and a succession tax. But that difference should not call for diverse results where precisely the same combination of events (the donor's survivorship of or death before an event certain to occur) determines whether he will continue to enjoy, or will have returned to him, property placed in trust by him, or whether that property will go to someone else. If technical theories of property law may be disregarded for purposes of a succession tax, they should likewise give way for purposes of the transfer tax. And whether there has been a shifting of economic benefits at death has been held to be equally determinative in the case of estate taxes (*Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345) as it has in the case of succession taxes (*Saltonstall* v. *Saltonstall,* 276 U. S. 260; but cf. *Coolidge* v. *Long,* 282 U. S. 582). The holding that the death of the donor results in shifting an economic benefit *to* the survivors certainly carries with it the conclusion that the economic benefit has come from some source at the death of the donor. The sum total of economic

benefits was originally in the donor prior to the transfer in trust. To the extent that he has not, in the creation of the trust, transferred those benefits to someone else they are retained by him. In such circumstances, if there is a shifting *to* the survivors, there must likewise be a shifting *from* the decedent.

3. In an effort to conform to the *St. Louis Trust Co.* decisions, the Treasury Department amended its regulations. Article 17, Regulations 80 (1937 Ed.), *infra,* p. 42. Under the amended regulations, turning upon technical and long outworn concepts of medieval property law, the line of demarcation will at times have to be drawn so nicely that the distinction made will seem the merest quibble. It is submitted that the statute does not require such a distinction, and we urge that the Court decide this case upon our Point II rather than Point I, so that the Treasury may be relieved of the necessity of continuing a practice which it feels was forced upon it by the *St. Louis Trust Co.* decisions.

The problem is one which cannot readily be dealt with by amendatory legislation. It would be unsatisfactory, if not almost impossible, to attempt to describe in the statute the numerous limitations of estates by which transfe are made to take effect in possession or enjoyment at or after the death of the grantor. In *Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; and *McCormick* v. *Burnet,* 283 U. S.

784, it was held that a transfer with the retention of a life estate in the grantor was not embraced within the statutory language as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.[4] In conjunction with those decisions, the decisions in the *St. Louis Trust Co.* cases deprive the statutory language of virtually any substance. The statute, speaking in terms of possession or enjoyment, carefully avoids the formal niceties involved in definitions of title. And since *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.* have adopted a purely formal test for determining the taxability of transfers intended to take effect in possession or enjoyment at or after death—a test that is inconsistent with principles that have long been applied by this Court, and particularly inconsistent with *Klein* v. *United States*—we respectfully submit that those decisions should be overruled.

4. Thus far in Point II, we have contended that there is no substantial difference between vested remainders subject to divestment and contingent remainders, that whichever the grantor retains there is a shifting of economic interest from him at death, and that the *St. Louis Trust Co.* cases which draw a distinction between the two types of interestes are unsound and should be overruled.

[4] The lacuna left by these decisions was soon filled by amendatory legislation directed at the specific point there involved. See *Helvering* v. *Bullard*, 303 U. S. 297.

But there is, in addition, a far more fundamental reason, wholly apart from the shifting of economic benefits at death, which justifies the imposition of the tax—namely, that the transfer was a substitute for a testamentary disposition, and was literally intended to take effect in possession or enjoyment at or after the grantor's death.

The federal estate tax statute seeks to reach not only property passing at death but also transfers intended as substitutes for testamentary dispositions. Probably the most familiar of the latter is the gift in contemplation of death. It is included in the gross estate, even though it be irrevocable, and even though it may have been completed many years before the grantor's death. Although nothing passes at death, the transfer is taxed as part of the gross estate because it is a *substitute* for testamentary disposition, and as such may properly be classified with property actually passing at death. See *Milliken* v. *United States*, 283 U. S. 15, 20; *United States* v. *Wells*, 283 U. S. 102. Similarly, an ordinary revocable *inter vivos* transfer is included in the gross estate (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339), because the shifting of economic interests is the element which converts an otherwise nontestamentary transfer into one that is a substitute for property passing at death. But the reservation of control and the

shifting of interests at death are not the only considerations that may justify the tax. For, as we have just seen, an irrevocable gift, if made in contemplation of death, is likewise included in the donor's gross estate. The common element is this: Both are testamentary in character, one because of the reserved power, the other by reason of the inherent nature of the gift.[5]

We submit that when Congress spoke of transfers intended to "take effect in possession or enjoyment" at or after the grantor's death, it meant exactly what it said and that it treated such transfers, wholly apart from the shifting of economic benefits, as inherently substitutes for property passing at death. Any additional requirement that there be a shifting of economic interests at death as well ignores the dual character of the estate tax which reaches not only property actually passing at death, but also irrevocable *inter vivos* gifts intended in lieu of testamentary gifts. If there is a shifting of interests at death then that fact alone would establish that the transfer was intended to take effect in possession or enjoyment at or after death. *Reinecke* v. *Northern Trust Co., supra.*

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[5] A similar situation exists in the field of income taxation. In addition to taxing income to the one who receives it, Congress taxes (a) the grantor of a revocable trust (*Corliss* v. *Bowers*, 281 U. S. 376) because of his power to control the income; and (b) it also taxes the grantor of an irrevocable trust, if under appropriate circumstances the trust performs a function for him that might normally be performed by the use of his own income (*Burnet* v. *Wells*, 289 U. S. 670).

But the absence of such a shifting cannot be fatal if the transfer were otherwise intended to take effect, etc.[a]

Congress carefully avoided the use of the word "title," or like terminology. It spoke only of

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[a] The shifting of economic interests at death may be important in cases where the original transfer was made before the enactment of the estate tax law and where it is necessary to meet the objection of retroactivity. In that situation, the fact that interests do pass at death after the enactment of the statute removes that objection. Thus, a tax on a completed gift made before the enactment of any federal estate tax law may be invalid where nothing passes at death occurring after the enactment of the statute (cf. *Nichols* v. *Coolidge*, 274 U. S. 531), but where there is a shifting of economic interests at death that objection cannot stand (cf. *Porter* v. *Commissioner*, 288 U. S. 436, 444–445; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345).

However, where the transfer is a substitute for a testamentary gift or may otherwise be classified with testamentary gifts, it is wholly immaterial whether or not there is any shifting of interests at death, provided that the transfer be made after the enactment of the estate tax law. This is strikingly brought out by a comparison between *Helvering* v. *City Bank Co.*, 296 U. S. 85, on the one hand, and *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98, on the other. Nothing passed at death in any one of those three cases; yet the tax was sustained in the *City Bank Co.* case, but invalidated in the other two because of retroactivity.

In the instant case, the transfer was made in 1919, after the enactment of the first federal estate tax law containing the provision relating to transfers intended to take effect in possession or enjoyment at or after death (Sec. 202 (b) of the Reveue Act of 1916, c. 463, 39 Stat. 756), so that the objection based upon retroactivity can have no force here. Cf. *Milliken* v. *United States*, 283 U. S. 15, 22; *Klein* v. *United States*, 283 U. S. 231, 234–235; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160, 166.

"possession or enjoyment." The distinction is plain. "An estate may be either vested *in possession*, or vested only *in interest*, the actual possession being in another. The phrase vested in possession needs no definition. An estate is said, though not vested in possession, to be vested in interest in a given person, when that person would be entitled, by virtue of it, to the actual possession of the lands, if the estate should become the estate in possession by the determination of all the precedent estates." (Challis, *Real Property* (3d Ed.), p. 74.)

Moreover, the provision dealing with transfers intended to effect, etc., appears in the same clause as the provision relating to gifts in contemplation of death. These provisions were meant to reach substitutes for testamentary dispositions. Therefore, if the gift of the remainder here in question can be regarded as having been intended literally to take effect in possession or enjoyment at or after the decedent's death, it was a substitute for a testamentary gift and should be taxed as such whether or not there was a shifting of economic interests at death.

Here, if the decedent had outlived his former wife, the trust property would all have been returned to him. Meanwhile, the income to a stated amount was to be used in discharge of his obligation to her, and the balance of the income to be returned to him. The decedent's children or

grandchildren had no right to use or dispose of the trust property so long as he lived. Until his death they had no assurance that they would ever have actual possession or enjoyment of the property. In every real sense, therefore, the transfer of the remainder to them was intended to take effect in possession or enjoyment at or after the decedent's death. And in every other case where property is transferred in trust either for the life of the grantor himself or for the life of some other person and where the *vesting in possession* of the remainder is contingent upon the death of the grantor, then such transfer not only literally falls within the statute, but is also precisely the kind of transfer at which the statute was directed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that judgments of the court below should be reversed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. [As amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.)

SEC. 315. [As amended by Section 613 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and sections 803 and 809 of the Revenue Act of 1932.] (a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in

fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 427.)

SEC. 316. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or

donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the decedent or donor.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(U. S. C., Title 26, Sec. 500.)

Prior to its amendment by Section 803 of the Revenue Act of 1932, the first sentence of Section 302 (c) of the Revenue Act of 1926 had been amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, to read as follows:[1]

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

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[1] The portion added by the amendment of March 3, 1931, is italicized.

Treasury Regulations 37 (1919 Ed.):

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. * * * A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to someone other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.

Provisions substantially the same as the above were contained in Treasury Regulations 37 (1921 Ed.), Article 24; Regulations 63 (1922 Ed.), Article 20; Regulations 68 (1924 Ed.), Article 18; Regulations 70 (1926 Ed.), Article 18; and Regulations 70 (1929 Ed.), Article 18.

Treasury Regulations 80 (1934 Ed.):

ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (2) transfers resulting from an arrangement, whether made before or after the enactment of the Revenue Act of 1916, if title was not to pass

from the decedent to the beneficiary unless the latter survived the former, or title, having passed, was to be divested and the property returned to the decedent if the beneficiary predeceased him (see article 17); (3) transfers made after the enactment of the Revenue Act of 1916 in the case possession or enjoyment was retained by the decedent (see article 18 and the exception stated therein); * * *

The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

* * * * *

ART. 17. *Transfers conditioned on survivorship.*—The expression, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer resulting from the execution of a written instrument or the making of an oral arrangement, without an adequate and full consideration in money or money's worth, whereby title was not to pass from the decedent to the beneficiary (or, if title passed it was to be defeated) unless he survived the decedent, and, should he not so survive, the property is to be restored to the decedent or become a part of his estate. The tax applies without regard to the time when the instrument was executed or the oral arrangement was made, whether before or after the enact-

ment of the Revenue Act of 1916. Thus the gift of a life estate with provision made that upon the death of the life tenant the property is to be returned to the decedent, if then living, otherwise to pass to another, the value of the entire property (less the value at the decedent's death of the life estate, if such estate was then outstanding and had not been transferred by the decedent in contemplation of his death) constitutes a part of the gross estate. It is unimportant whether the decedent's interest be denominated a reversion or a possibility of reverter, and whether the interest of the remainderman is contingent or vested subject to be divested. (See article 15.)

ART. 18. *Transfers with possession or enjoyment retained.* — (a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this sub-

division do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Treasury Regulations 80 (1937 Ed.):

ART. 15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see article 16); (2) transfers to the extent that title remained in the decedent at the time of his death and the passing thereof was conditioned upon his death (see article 17); (3) transfers under which the decedent reserved or retained (in whole or in part) the use, possession, rents, or other income or enjoyment of the transferred property, for his life, or for a period not ascertainable without reference to his death, or for a period of such duration as to evidence an intention that it should extend to his death; including also the reservation or retention of the use, possession, rents, or other income, the actual enjoyment of which was to await the termination of a transferred precedent interest or estate (see article 18); * * *

ART. 17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the

beneficial title to the property (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), remained in the decedent at the time of his death and the passing thereof was subject to the condition precedent of his death. If the tax applies, it does so without regard to the time of the transfer, whether before or after the enactment of the Revenue Act of 1916.

On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event. (See article 15.)

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